

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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| In the Matter of the Nebraska Public Service |) | Application No. NUSF-1 |
| Commission, on its own motion, seeking to |) | |
| establish guidelines for administration of the |) | PROGRESSION ORDER NO. 18 |
| Nebraska Universal Service Fund. |) | |

Post-Hearing Reply Brief of the Rural Independent Companies

I. Introduction

The Commission requested interested parties to submit legal briefs addressing the issues presented in Progression Order No. 18 ("PO 18"). Briefs were submitted by United Telephone Company of the West d/b/a Embarq ("Embarq"), Rural Telecommunications Coalition of Nebraska ("RTCN"), the Rural Independent Companies ("RIC") and Qwest Corporation ("Qwest"). The advocacy set forth in the briefs filed by Embarq, RTCN and RIC is quite similar and presents similar conclusions regarding the issues presented by the Commission in PO 18. The advocacy set forth in the Qwest brief reaches contrary conclusions.

The purpose of this Reply Brief is to refute the conclusions proffered by Qwest in its brief and to reaffirm the conclusions presented by Embarq, RTCN and RIC for the resolution of the issues presented by PO 18. In doing so, RIC will review a recent Federal court decision that affirms the jurisdiction of the Missouri Public Service Commission to classify Voice over Internet Protocol ("VoIP") traffic as telecommunications service.¹

II. This Commission is not pre-empted from assessing the NUSF surcharge on the Nebraska intrastate revenues derived from interconnected VoIP service.

¹ *Comcast IP Phone of Missouri, LLC v. Missouri Public Service Commission*, 207 WL 172359 (W.D. Mo., Jan. 18, 2007) ("*Comcast Missouri*").

In the RIC's principal brief filed herein, it was noted that only Level 3 Communications, LLC claimed that the Federal Communications Commission ("FCC") has exclusive jurisdiction over interconnected VoIP service, irrespective of the regulatory issue that is involved. (RIC Brief at 6) Now that briefs have been filed (Level 3 did not submit a legal brief to present legal authorities to support its claim that this Commission lacks jurisdiction over interconnected VoIP service providers), only Qwest has presented any legal arguments that this Commission has been pre-empted from assessing the NUSF surcharge on interconnected VoIP service. However, a cursory examination of Qwest's arguments reveals that such arguments are not well founded.

First, Qwest contends that "its pre-filed and oral testimony presented at hearing . . . demonstrates [that] VoIP is an interstate information service not an intrastate telecommunications service." (Qwest Brief at p. 1) The foregoing assertion is made without citation to any legal authority. Of course, this is not surprising because the FCC has not yet determined the statutory classification of interconnected VoIP service as either "information service" or "telecommunications service". Rather, as cited in the RIC's Brief, in its *Vonage Order* the FCC specifically reserved its determination of the statutory classification of VoIP service under the Communications Act.² Such ruling was reserved for the FCC's consideration in the *IP-Enabled Services Proceeding*.³ The absence of a determination by the FCC as to the statutory classification of interconnected

² RIC Brief at pp. 6-7 citing *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (2004) ("*Vonage Order*").

³ *In the Matter of IP-Enabled Services*, 19 F.C.C.R. 4863 (2004) ("*IP-Enabled Services Proceeding*").

VoIP service was further confirmed in the *VoIP 911 Order* and in the *USF Contribution Order*.⁴

The matter of federal pre-emption with regard to VoIP service was discussed at length in the *Comcast Missouri* case. Such case focused on the question as to whether the Missouri Commission possesses jurisdiction to determine the statutory classification of VoIP service – an even more fundamental issue of federal-state jurisdiction than is the issue presented by PO 18 regarding assessment of the NUSF surcharge on interconnected VoIP service. The Court framed the jurisdictional argument presented by Comcast as follows:

Comcast, however, argues that MoPSC cannot classify Digital Voice as a telecommunications service unless and until the FCC determines that Digital Voice is a telecommunications service. In so doing, Comcast argues the MoPSC has impermissibly placed itself in the role Congress allocated to the FCC. [omitting cite] In essence, Comcast argues that if the FCC never classifies Digital Voice as either a telecommunications service or an information service, then Digital Voice will forever go unregulated.

Comcast Missouri at p. 4. In rejecting this argument by Comcast, Judge Laughrey reasoned as follows:

Accordingly, the Court finds that Congress did not intend for VoIP services to be completely unregulated. And, *unless preempted or faced with a contrary decision from a relevant federal agency, a state agency may interpret a federal statute and apply its dictates*. Therefore, in the absence of preemption or a contrary determination by the FCC, the MoPSC has jurisdiction to decide whether Digital Voice is a telecommunications service.

Id. (emphasis added). Not only does the foregoing discussion effectively rebut Qwest's claim that the FCC has determined that VoIP service is an "interstate information

⁴ See Embarq Brief at pp. 4-5, citing *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257-58, para. 52 (2005) ("*VoIP 911 Order*") and see *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking, para. 35 (rel. June 27, 2006) (the "*USF Contribution Order*").

service”, but the foregoing holding affirms the authority of state commissions to make determinations concerning VoIP such as the assessment of the NUSF surcharge on interconnected VoIP service as presented herein.

The other contention made by Qwest regarding this Commission’s jurisdiction is the assertion that assessment of the NUSF surcharge on interconnected VoIP service would constitute “regulating commerce beyond Nebraska’s state borders, which is a violation [sic] of the Commerce Clause.”⁵ Citing the *Vonage Order* at paras. 38-39, Qwest asserts that this Commerce Clause argument “was the justification the FCC used to preempt the field of VoIP regulation.”⁶ Of course, the fundamental flaw in this argument is that the FCC has not “preempted the field” relative to VoIP service, as demonstrated by the arguments made in the RIC and Embarq briefs cited above.⁷ The Court in *Comcast Missouri* specifically addressed this issue as follows:

[T]he Court is unable to find that the FCC has declared all VoIP services to be information services. Furthermore, the fact that the FCC has opened a rule-making proceeding is not an expression of the FCC’s intent to preempt the entire field of VoIP services. Therefore, the Court is unable to find that the FCC has preempted the entire field of VoIP services or that allowing state regulation of intrastate telecommunications services, which also happen to be VoIP services, stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Comcast Missouri at p. 5.

Further, Qwest’s argument fails to take into account the mechanisms for identification of the interstate and intrastate portions of revenues derived from interconnected VoIP service that are discussed in the following section of this Reply

⁵ Qwest Brief at p. 2.

⁶ *Id.*

⁷ See also, RTCN Brief at pp. 6-10 for further discussion of this Commission’s authority to assess the NUSF surcharge on the intrastate portion of interconnected VoIP service.

Brief, and which provide this Commission with a means to separate interstate and international telecommunications revenues from intrastate telecommunications revenues relative to assessment of the NUSF surcharge.

Qwest's Commerce Clause argument is not well founded. The weight of legal authorities, the record in this matter and the arguments presented in the briefs submitted by Embarq, RTCN and RIC support the conclusion that this Commission has the authority to assess the NUSF surcharge on the Nebraska intrastate portion of revenues derived by interconnected VoIP service providers. For the reasons stated by Embarq, RTCN and RIC in their briefs, the Commission should conclude that interconnected VoIP service providers provide "telecommunications" and that such providers are required to contribute to the NUSF.⁸

III. The safe harbor mechanism identified in the *USF Contribution Order* should be adopted by the Commission.

In PO 18 the Commission also requested input from carriers regarding its proposal to require interconnected VoIP service providers to contribute to the NUSF based on the FCC's safe harbor rules.⁹ In their briefs, Embarq, RTCN and RIC each supported the Commission's adoption of such safe harbor allocation as identified by the FCC in the *USF Contribution Order*.¹⁰ Qwest's Brief does not directly respond to this subject. Qwest only questions the method that may be utilized to determine the state to which the intrastate portion of interconnected VoIP service belongs.¹¹

⁸ See, RIC Brief at pp. 9-12; RTCN Brief at pp. 6-13; and Embarq Brief at pp. 1-3.

⁹ PO 18 at p. 3.

¹⁰ *USF Contribution Order* at paras. 52-57.

¹¹ Qwest Brief at p. 2.

RIC submits that the briefs of the parties as well as the record established at the hearing on PO 18 establish that there is consensus that the Commission should adopt the FCC's safe harbor rule in connection with its final resolution of this docket. In doing so, interconnected VoIP service providers should choose among three options for separating interstate and international telecommunications revenues from intrastate telecommunications revenues. These options are:

- 1) Use the interim safe harbor set in the order (i.e., 64.9% interstate);
- 2) Use actual interstate and intrastate revenues; or
- 3) Use an FCC-approved traffic study.¹²

With regard to Qwest's concern as to whether customer address or registered location should be utilized, RIC refers the Commission to its Brief at pages 13-14 in which RIC suggests that customer address be used for the purpose of identifying revenues derived by the interconnected VoIP service provider in connection with the provision of its services in Nebraska. This choice is fair, reasonable and straight-forward to administer.

IV. Conclusion

RIC respectfully submits that this Commission should adopt the recommendations set forth in the Conclusion to RIC's Brief filed in this docket as the basis for resolving the issues presented herein.

Dated: February 2, 2007.

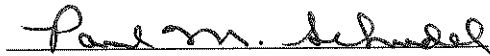
¹² See *USF Contribution Order*, paras. 52-57.

Respectfully submitted,

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Hamilton Telephone Company,
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2007, the original and five (5) paper copies, together with an electronic copy, of the Post-Hearing Brief of the Rural Independent Companies was served upon Andy S. Pollock, Executive Director of the Commission, by hand-delivery and electronically, and upon the following parties by email:

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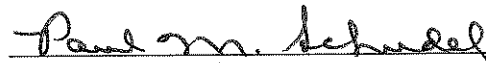
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